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Bounded Cosmopolitanism and a Constitutional Common Law

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INTRODUCTION

Law is now viewed in increasingly transnational terms, in the sense that legal norms and institutions extend beyond national boundaries. Thus, the way we conceive of applicable law and subjects of the law have grown to reflect a transnational orientation. Yet, there remains deep uncertainty regarding the growing transnational nature and scope of law. This uncertainty is in part answered by, but also fuelled by, current cosmopolitan theories. Such theories -including Jeremy Waldron's conception of a '*ius gentium*'¹ as a body of principles shared by the legal world, and Neil Walker's articulation of 'global law'²- are decidedly cosmopolitan in nature by articulating legal orders and systems that see the individual as part of a shared human community.³ While these theories make valuable contributions to legal studies, they have overreached by asserting an extensive level of transnational consensus, consensus which is not fully represented in current transnational dialogue. What is needed is a framework that balances the cosmopolitan impulse with awareness of the current experience of transnational law, and the historical and cultural limitations on transnational dialogue. With this contextual background in mind, I propose the idea of 'bounded cosmopolitanism', which harnesses the power of cosmopolitanism but restrains the cosmopolitan impulse through awareness of the interplay between convergence and divergence that is central to the experience of transnational law. As an instance of bounded cosmopolitanism, the article advances a cosmopolitan common law constitution, which

¹ Waldron, J (2012) *Partly Laws Common to All Mankind* Yale University Press.

² See Walker, N (2014) *Intimations of Global Law* Cambridge University Press; Goodwin, M (2012) 'What I talk about when I talk about Global Law' (17) *Tilburg Law Review* 269; Domingo, R (2010) *The New Global Law* Cambridge University Press.

³ Cosmopolitanism is used in this article to express the core idea of a shared community among all humanity, regardless of national social or political affiliation. See Anderson-Gold, S (2001) *Cosmopolitanism and Human Rights* University of Wales Press at 1-13; Kleingeld, P and Brown, E (2014) 'Cosmopolitanism', in Zalta, EN (ed) (2014) *The Stanford Encyclopedia of Philosophy*, available at: <http://plato.stanford.edu/archives/fall2014/entries/cosmopolitanism/>.

embodies the convergent influence of common law methods and principles with the divergent elements of specific constitutional design in individual common law jurisdictions.

In Part Two of this article, I briefly assess the impact of transnational interactions on legal discourse, explaining the need for a normative underpinning for the myriad communications and transactions engaged in across national boundaries. Part Two also examines current attempts at constructing and defending a cosmopolitan view of law- with a special focus on Jeremy Waldron's *ius gentium* theory and Neil Walker's conceptualisation of global law. I maintain that while these attempts have been meaningful contributions to the field of transnational law, particularly by revealing the cosmopolitan direction of law, their scope is overbroad. Part Three advances a proposal that seeks to avoid such overreach by articulating an approach that is founded on a rationale of 'bounded cosmopolitanism'. As one instance showing the potential for bounded cosmopolitanism, Part Four argues that the common law operates as a base of cosmopolitan constitutional development. This task is undertaken through examination of the nature of the common law, its capacity as a constitutional source and its receptivity to external influences. Part Five then offers substantive and methodological examples of the cosmopolitan common law constitution in operation. The task of illustrating a cosmopolitan common law constitution is deliberately approached exclusively by reference to comparative constitutionalism in adjudication; a broader analysis involving both comparative and international law would be beyond the scope of this article. This analysis of common law norms and methods across a range of common law jurisdictions reveals the transnational development and relevance of common law and the potential of viewing transnational legal expansion within a model of bounded cosmopolitanism.

THE COSMOPOLITAN IMPULSE AND CURRENT ATTEMPTS AT COSMOPOLITAN LAW

Cosmopolitanism conveys the belief that rights and obligations derive not from the nation state but from the interests and needs of the individual.⁴ Yet, cosmopolitanism, despite its strong unifying ethos, exists alongside instruments of closure; the philosophy emphasizes the influence of the bonds that traverse borders but does not necessitate an end to the state, to distinct languages, political entities and social institutions. Varying schools of

⁴ Glenn, P (2013) *A Cosmopolitan State* Oxford University Press at 172-73.

cosmopolitanism are animated in political and cultural theory, with stronger versions demanding a world community in which national borders are irrelevant while weaker versions encourage the development of practices that enable co-existence and the management of difference.⁵ Among those who seek to temper cosmopolitan impulses is Kwame Appiah who advocates ‘cosmopolitan patriotism’ which sees individuals as ‘citizens of the world’ but rooted in, and showing greater allegiance to their homelands.⁶ It is this spirit of embracing and tempering cosmopolitanism that this article seeks to bring to approaches to cosmopolitan law.

There is a strong impulse towards cosmopolitanism that is reflected in current legal theories of transnational law. This impulse is fuelled by a confluence of factors, including the scientific desire to describe and account for the observed phenomenon of economic, legal and cultural interchanges and acknowledgement of a continuing reality of communications and transfer of knowledge, expertise, ideas and norms across national boundaries.⁷ Further, there is a perceived need to regulate transnational interactions⁸ and to examine the extent of normative commonality underlying the interactions between state institutions (legislatures, courts) and social and transnational institutions (corporations, associations, transnational legal systems).⁹ Cosmopolitanism, viewed through this lens, partly enables law and legal studies to keep pace with reality.

The impetus for cosmopolitanism is accordingly bound up with globalisation, a term that conjures up images of expeditive cross-border communications and harmonisation of laws.¹⁰ Yet, keeping pace with reality also demands that legal scholars embrace the pluralism that has accompanied globalisation. Pluralism is a useful indicator of the porosity of legal boundaries as legal transplantation and migration have resulted in the blending of legal traditions. Rather than a transplanted legal norm or legal culture completely dominating the local law, there is a more complex dynamic in which a transplanted norm interacts with and adapts to the legal and socio-cultural traditions of the locale. So too, ‘the constant interaction

⁵ See, eg, Appiah, K (1997) ‘Cosmopolitan Patriots’ (23) *Critical Inquiry* 617 at 629.

⁶ Ibid at 619-22 cf Nussbaum, M (1996) ‘Patriotism and Cosmopolitanism’ in Cohen, J (ed) (1996) *For Love of Country: Debating the Limits of Patriotism* Beacon Press.

⁷ Twining, W (2009) *Globalisation and Legal Scholarship* Wolf Legal Publishers at 20-31.

⁸ Drahos P and Braithwaite, J (2001) ‘The Globalisation of Regulation’ (9) *Journal of Political Philosophy* 103 at 106-07.

⁹ Chang, W and Yeh, J (2012) ‘Internationalization of Constitutional Law’ in Ronsenfeld, M and Sajó, A (2012) *The Oxford Handbook of Comparative Constitutional Law* Oxford University Press at 1169-71.

¹⁰ Menski, W (2006) *Comparative law in a global context: the legal systems of Asia and Africa* Cambridge University Press at 3.

between the global and the local creates more plurality rather than greater uniformity'.¹¹ Alongside these trends, the process of globalisation itself is not a single undifferentiated and unifocal process. As Glenn puts it, 'there are multiple globalizations',¹² globalisation is seen not only in the fields of technology, business and law, but also in religion, and globalisation does not proceed from merely the western regions of the world but also from the east. While there is western dominance within those globalisation processes, an accurate assessment of the dimensions of such dominance ought to proceed from the full picture of globalisation in the world today. Thus, if cosmopolitanism in legal scholarship is to be relevant and useful, it must account for the realities of pluralism and diversity as not only existing alongside globalisation, but also as features of globalisation.

Moreover, there is a compelling need for self-awareness in our description and analysis of globalised law. Lurking behind the movements towards globalised visions of law and legal systems is the concern that current movements represent 'a remodelled version of earlier colonial domination'.¹³ Legal transplantation from coloniser to colonised, with implications of European superiority, were a feature of a colonial period which transnational law scholars must reckon with today. This calls for frank discussion of the extent to which transplantation has given way to reciprocity and/or dialogue, and whether Eurocentricity is being replaced by true globality.¹⁴ Central to the frank self-awareness required by the exercise of cosmopolitanism in law is a determination whether claims of universalism mask the proliferation of westernisation and an accurate assessment of the breadth of acceptance of claimed universal norms.

The need for self-awareness and caution in discourse on 'globalised' law sits uneasily with the themes and features of *ius gentium* and global law proposals. The *ius gentium* seeks to resurrect and refine ancient ideas of 'a common law of mankind', which bore connections to both natural law and the Roman Empire's recognition of laws common and applicable to foreigners who did not have the benefit of ordinary Roman law.¹⁵ Waldron's reconfiguration of the *ius gentium* situates this theory within the context of comparative law, international law and globalisation in the 20th and 21st centuries. He describes the modern *ius gentium* as a system of legal principles common to the legal world. Waldron's theory helpfully elevates

¹¹ Ibid at 12.

¹² Glenn, P (2014) *Legal Traditions in the World: Sustainable Diversity in Law* Oxford University Press 2014 at 54.

¹³ Menski supra note 10 at 37.

¹⁴ Wheatle, S (2015) 'Comparative Law and the *Ius Gentium*' (3) Cambridge Journal of International and Comparative Law 1060.

¹⁵ Waldron, J (2005) 'Foreign Law and the Modern *Ius Gentium*' (119) Harvard Law Review 129 at 132-34.

and utilises both the comparative method and- to a lesser extent- international law to identify substantive norms. Concurrently, the global law field has received growing attention from scholars, giving rise to conferences, symposia and scholarly work, the most recent and significant offering of which is Neil Walker's *Intimations of Global Law*. Walker's thesis merits close study and particular attention as it seeks to address the most salient and piercing critiques of the global law movement. Acknowledging the 'compromised quality' of the term global law, which partly arises from global law's presumptions about the advance of globalisation and the eclipsing of the state, Walker undertakes a reconceptualisation of global law.¹⁶ The new conception understands global law as law which shares 'a practical endorsement of or commitment to the universal or otherwise global-in-general' authority of some laws.¹⁷ Global law, so described, is drawn from multiple sources, including national, regional, comparative and international law and is not limited by source, but only by the potential reach of the law.

Across both the *ius gentium* and global law proposals there is a commitment to universality or globality. Global law is so identified because of its universal or global authority, having either a universal scope 'in-principle' or a 'tangible sense of a law that can [...] spread across the globe'.¹⁸ Global law then, has 'no a priori territorial limitation' and purports to cover all actors and activities relevant to its remit across the globe.'¹⁹ Universality is also an unmistakable theme of the *ius gentium*. Relying largely on comparative constitutional adjudication, Waldron describes the *ius gentium* as 'laws common to all mankind', comprised of universal principles observed in the legal world.²⁰ Despite Waldron's claims of the modesty of his theory, it makes a rather bold claim of the existence of the *ius gentium* as a legal system. Yet, transnational legal discourse occurs largely within networks often defined by common languages or legal heritage.²¹ Waldron's response is to maintain that the *ius gentium* is currently in existence despite that it develops unevenly, 'in fits and starts'.²² Yet, even accepting an uneven development, the existence of a system applicable to the entire legal world is undermined by the fact that transnational legal exchanges tend to

¹⁶ Walker, *Intimations* supra note 2 at 3-11.

¹⁷ Walker, *Intimations* supra note 2 at 18.

¹⁸ Walker, *Intimations* supra note 2 at 23.

¹⁹ Walker, *Intimations* supra note 2 at 21.

²⁰ Waldron, *Partly Laws* supra note 1 at 3 and 68.

²¹ Law, D & Versteeg, M (2011) 'The Evolution and Ideology of Global Constitutionalism' (99) *California Law Review* 1163. A common language is an important connector; though some English-speaking states (such as South Africa and the United States of America) have a distinct civil law influence, the common language fosters continued communication with other Anglophone jurisdictions.

²² Waldron, *Partly Laws* supra note 1 at 208.

occur within networks; the disparate and uneven development of such exchanges means that the *ius gentium* cannot possess all the elements- particularly the cohesion- of a legal system.²³ The notion of doctrinal systematicity across the legal world, rather than within closely interrelated and highly communicative systems, requires more detailed treatment than has thus far been afforded.²⁴ Moreover, as Fredman notes: ‘Even within international law, it has become increasingly difficult to find a cohesive set of central principles. How much more so for comparative law?’²⁵

Walker seeks to avoid similar difficulties by describing ‘intimations’ of global law, rather than a fully established system and by expressing multiple qualifications and mutually existing definitions for global law. Thus, as intimations, Walker conceives of global law as more aspirational- ‘in the process of becoming’- rather than settled law. Moreover, global law as conceived by Walker can be ascribed ‘global’ on account of either the source of the law, the applicability of the law or even the mere belief in the global potential of (the) law.²⁶ Under the banner of this definition, a law can be ‘global’ on account of its source (such as the United Nations), on account of its effect or merely on the basis that the law represents an ‘endorsement’ of the prospect that it could spread across the globe.²⁷ By so qualifying his claims, Walker sidesteps what would be a vulnerable requirement that global law be globally applicable, a characteristic which would mirror one of the flaws with Waldron’s theory. Yet, the multiple qualifications and definitions ultimately undermine the use value of global law. They limit the ability to pin down the actual meaning of global law and the identification of specific norms that would qualify as global beyond *ius cogens* and *erga omnes* norms, which are cited by Walker as examples of norms with global effect. Moreover, the varying definitions expose underlying doubt and insecurity about the true meaning and even existence of global law. In sum, while engaging with the cosmopolitan direction of law, the coverage claimed by both *ius gentium* and global law proposals extends beyond the conceptual or empirical support presented.

Constitutionalism also figures significantly in both Walker’s and Waldron’s theories. Waldron’s analysis relies heavily on constitutional and human rights issues and decisions; he characterises the *ius gentium* as a body of laws that is particularly applicable to relations

²³ Waldron, *Partly Laws* supra note 1 at 200; Wheatle supra note 14 at 1060 and 1076-77.

²⁴ Waldron, *Partly Laws* supra note 1 at 67-70.

²⁵ Fredman, S (2015) ‘Foreign fads or fashions? The role of comparativism in human rights law’ (64) *International and Comparative Law Quarterly* 631 at 640.

²⁶ Walker, *Intimations* supra note 2.

²⁷ Walker, *Intimations* supra note 2 at 20-24.

between individuals and the government.²⁸ Indeed, decisions and transnational conversations relating to the death penalty, equality and freedom of expression are dominant in Waldron's defence of the *ius gentium*. Meanwhile, Walker's work identifies in global law an approach that involves basic principles and normative templates that condition and constrain the legal order.²⁹ Walker classifies human rights - whether derived from international, regional or national sites - as part of those core normative claims.³⁰ Both theories seem to acknowledge—correctly, in my view- that a constitutional framework is an essential underpinning for any articulation of a model for a normative order, providing as it does the structural and constitutive guides and restraints for the multiple norms and institutions of that legal order. It is constitutional norms that provide the requisite coherence for the interrelation between varied norms of the order and their logical development over time. Yet, the constitutional elements of both theories ultimately rest on an overbroad vision of law in the world.

BOUNDED COSMOPOLITANISM

In response to the cosmopolitan impulse as well as the contributions and shortcomings of current theories, the challenge is to develop an approach that combines a 'globality conscious' and 'plurality-sensitive' view of the law and transnational legal communications.³¹ The bounded cosmopolitanism approach seeks to answer this call; it rests within a cosmopolitan framework through acknowledgment of interactions and communications beyond the state and a modern view of legal development that transcends traditional boundaries. Accepting the continuation of normative differentiation and compartmentalised relationships, bounded cosmopolitanism recognises and demarcates shared spaces for the management of normative conflict.

Awareness and meaningful recognition of compartmentalisation in transnational exchanges is a crucial part of developing an accurate picture of transnational constitutionalism in the world today. Compartmentalisation occurs as a result of variance of political and legal culture, and networks defined by history, experience and language. Consequently, there is ample empirical data testifying to the tendency of references to foreign

²⁸ Waldron, *Partly Laws* supra note 1 at 28.

²⁹ Walker, *Intimations* supra note 2 at 70. Constitutionalism is central to what Walker describes as 'convergent approaches' to global law: Walker *Intimations* supra note 2 at 58-106.

³⁰ Walker *Intimations* supra note 2 at 72.

³¹ The terms 'globality-conscious' and 'plurality-sensitive' are borrowed from Menski supra note 10 at 81. While Menski does not adopt a typology of common law and civil law, he does maintain the need for awareness of difference and divides jurisdictions into categories such as Hindu law and African law.

law to be dominated by jurisdictions that share a legal tradition.³² Further, experiential connections and cultural similarities prove significant, and partly account for the tendency of developed countries to cite each other.³³ This compartmentalisation affects legal communications and legal doctrine and must be accounted for in formulating models of cosmopolitanism. Thus, there are transnational legal orders developing within networks but without the density and cohesion of national constitutional systems.³⁴

Compartmentalisation bears similarities with the idea of fragmentation popularised by Gunther Teubner.³⁵ The fragmentation metaphor utilised by Teubner helps to frame both the problem of and the solution to, a cosmopolitanism that argues for a ‘unitary global constitution’. The compartmentalisation metaphor used in this article serves a similar purpose by explaining the need to reject a unitary cosmopolitan legal framework and pointing the way forward for a cosmopolitanism that is transnational but not unitary. Yet, fragmentation and compartmentalisation have different starting points and rest on different assumptions. The metaphor of fragmentation is top down and assumes the existence of a larger normative order that has been or is being disintegrated. Compartmentalisation, on the other hand, approaches the growth of cosmopolitanism using a bottom up approach that sees emerging consensus developing from transnational conversations between legal actors within networks.

Within this theoretical framework, emerging examples can be found of the existence of bounded cosmopolitanism. Some of these instances exist as regional networks whereas others are apparent in tradition-based connections. The European Union, for instance, has given rise to a cosmopolitan order in the form of the much debated emergence of EU constitutionalism.³⁶ The countries of the Commonwealth Caribbean would also demonstrate bounded cosmopolitanism, reflecting a combination of common law, national constitutions and related judgments from the Judicial Committee of the Privy Council and the Caribbean

³² Law and Versteeg *Intimations* supra note 2; Saunders, C and Stone, A (2013) ‘Reference to Foreign Precedents by the Australian High Court: A Matter of Method’ in Groppi, T & Ponthoreau, M (eds) (2013) *The Use of Foreign Precedents by Constitutional Judges* Hart Publishing.

³³ See Groppi, T and Ponthoreau, M (2013) ‘Conclusion’ in Groppi and Ponthoreau supra note 32 at 418-19.

³⁴ See Teubner, G (2012) *Constitutional Fragments: Societal Constitutionalism and Globalization* Oxford University Press at 8.

³⁵ On constitutional fragmentation, see *ibid*; del Moral, I (2010) ‘At King Agramant’s camp: Old debates, new constitutional times’ (8) *International Journal of Constitutional Law* 580.

³⁶ Walker, N (2009) ‘Reframing EU Constitutionalism’ in Dunoff, J and Trachtman, J (eds) (2009) *Ruling the World? Constitutionalism, International Law and Global Governance* Cambridge University Press 2009 at 149; Stone Sweet, A (2012) ‘A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe’ (1) *Global Constitutionalism* 53.

Court of Justice.³⁷ The cosmopolitan common law constitution provides one model for the operation of bounded cosmopolitanism. It reflects cosmopolitanism's unifying ethos by encompassing constitutional norms and methods that have gained consensus in common law jurisdictions. While not displacing the codified constitutions which exist in most common law states, the common law constitution provides a bedrock of broadly applicable tools that exist alongside those codified constitutions. The cosmopolitan common law constitution is representative of the central features of bounded cosmopolitanism, as it rests on the common bonds of common law norms and methods as well as divergent factors such as varying constitutional and institutional contexts.

The argument supporting the existence of a cosmopolitan common law constitution is both descriptive and normative. The normative elements exist in my view that an examination of both the nature of a constitution and the nature of the common law reveal the common law's capacity for transnational constitutional relevance. The normative argument is supplemented by observation of the ways in which common law principles and methods are currently being developed and employed across jurisdictions. Yet, this proposal is more modest than current attempts at globalised legal systems, in its geographical scope as well as in its systemic claims. Geographically, it is limited by the reach of the common law, being only applicable in and among common law networks. Systematically, there is no attempt to prove that a cosmopolitan common law constitution is a current system of law. This proposal adopts Waldron's helpful method of discerning consensus across jurisdictions, but maintains that such consensus, rather than being global, is limited by networks, and rather than having crystallized into a system, remains a developing phenomenon without doctrinal systematicity. The argument advanced in this article is that there is an iterative process of transnational common law constitutionalism occurring among common law jurisdictions.

The following section will make the case for the existence of a cosmopolitan common law constitution by addressing, first, the constitutional capacity of the common law and second, the common law's cosmopolitan relevance. In doing so, we see the elements of bounded cosmopolitanism in the transnational scope and unifying features of the common law alongside the divergence and pluralism occasioned by varying national constitutional features.

³⁷ For most Commonwealth Caribbean states, the Privy Council is the final appellate body but Guyana, Barbados, Belize and Dominica have replaced the Privy Council's appellate jurisdiction with the Caribbean Court of Justice.

THE COMMON LAW'S COSMOPOLITAN CONSTITUTIONALISM

There are two ideas of 'common law' which are activated in this discussion. In the first sense, common law is used to denote that source of law that is distinct from statute law and developed through judicial decisions. The second sense of the word common law is to describe the common law legal tradition – a legal tradition developed in England after the Norman Conquest and later spreading across diverse nations through colonialism. At the risk of over-simplification, this tradition is typified by characteristics such as a central role for judges in developing legal norms, a focus on case law, a doctrine of precedent and an uncoded legal system, which, while including statutes, lacks comprehensive legal codes.³⁸ Undoubtedly, the common law legal system is not a pure, hermetic group, but -like all legal systems- experiences levels of mixes and overlaps.³⁹ The historical root of the common law legal family is now significantly impacted by the European Union through the European Communities Act 1972 and by the European Convention on Human Rights through the vehicle of the Human Rights Act 1998, but it undoubtedly remains a common law jurisdiction. So also, while religious law is a significant facet of Indian law and there were attempts at codification in core areas of law, the Indian legal system maintains a common law character.⁴⁰ With this understanding of the common law, the concept of a cosmopolitan common law constitution applies most definitively to a core of common law countries, namely those that are English-speaking, despite having incorporated civil, religious or customary concepts, such as Australia, Canada, the Commonwealth Caribbean, Fiji and Ghana. In addition, there are countries that reside more on the periphery of the common law – such as the United States of America, South Africa and Pakistan – where there are looser (but still existing connections) to a cosmopolitan common law constitution. The source-based sense of the common law provides the methodological and substantive underpinning for developing transnational constitutionalism within a network that is geographically limited and defined by the legal-tradition based sense of the common law.

³⁸ Zweigert, K and Kötz, H (1998) *An Introduction to Comparative Law* (3rd edn) Clarendon Press; Simpson, AWB (2008) 'Common Law' in Peter Cane and Joanne Conaghan (eds) (2008) *New Oxford Companion to Law* Oxford University Press at 164.

³⁹ Öricü, E (2004) 'Family Trees for Legal Systems: Towards a Contemporary Approach' in Van Hoecke, M (ed) (2004) *Epistemology and Methodology of Comparative Law* Hart Publishing at 363; Häcker, B (2015) 'Divergence and convergence in the common law - lessons from the *ius commune*' (131) *Law Quarterly Review* 424 at 438-39.

⁴⁰ De Cruz, P (2006) *Comparative Law in a Changing World* Cavendish Publishing at 125-26; Siems, M (2014) *Comparative Law* Cambridge University Press at 44.

The premise for the cosmopolitan common law constitution lies in both the nature of a constitution and the nature of the common law. A constitution is defined by distinctive features, central among those being the constitutive, constraining and fundamental qualities of a constitution. The constitutive work of a constitution exists in its role in the identification of the legal and political structure of the state. The ongoing work of constitutional norms in defining the powers and duties of government provides a common point of impact between the constitution and administrative organs, as well as between courts and the executive. The primacy of constitutional norms over ordinary norms, which form part of what is commonly dubbed the ‘ordinary law’ of the state, earns the constitution the title of fundamental law. This understanding of the central functions of a constitution consciously omits any requirement for a constitution to restrict legislative competence. Such restrictive conceptions of a constitution do not possess the analytical value of application to a range of organisational models and political systems. Moreover, overly prescriptive and inflexible models of constitutionalism that mandate features such as a codified document, comprehensive human rights protections or substantive legal restraints on legislative power are of limited use to comparatists as they would privilege specific political preferences and particular constitutional designs while excluding important constitutional models such as those in the United Kingdom or Australia.⁴¹ There is no doubt that while this conceptualisation of a constitution is applicable to a wide cross-section of existing constitutional models, this understanding of a constitution- particularly the elevation of constitutional over ordinary norms- would be rejected by at least some adherents of political constitutionalism. The features outlined here therefore apply to constitutional models *in practice* despite not conforming to either a political or legal constitutionalist *ideal*.⁴²

The recognition of a constitution as a source of fundamental norms is central to its exalted position among laws. Consistent with this feature of a constitution, a modern view of the common law sees within it a bedrock of fundamental norms that condition the interpretation and operation of other common law rules and exert special influence on the workings of the state and the interaction between the individual and the state. Traditional ideas of the common law as a flat terrain of coterminous rules are no longer- if they ever

⁴¹ Feldman, D (2011) ‘Which in Your Case You Have Not Got’: Constitutionalism at Home and Abroad’ (64) *Current Legal Problems* 117 at 120-21.

⁴² Indeed, the political constitutionalist ideal has been defeated as a practical matter and the trend in common law jurisdictions is towards a combination of political and legal constitutionalism. See Gardbaum, S (2013) *The New Commonwealth Model of Constitutionalism* Cambridge University Press at 21-38.

were- convincing.⁴³ The articulation of common law rights- particularly in a series of British cases in the late 1990s- and the ‘recent resurgence of the common law as a source of rights protection’, are indicative of the constitutional import of select common law norms.⁴⁴ Even beyond the sphere of rights properly so called, common law constitutional principles relating to the organization of the state are making their mark on constitutional development. Superior courts in countries such as Australia, Jamaica and the UK have spoken to fundamental common law constitutional principles such as the rule of law and their role in interpreting ordinary statutes and constitutional instruments and in conditioning the relationship between institutions of state.⁴⁵ Thus, in a UK Supreme Court judgment in *HS2*, Lords Neuberger and Mance asserted the existence of ‘fundamental principles, whether contained in other constitutional instruments or recognised at common law’ and made the significant doctrinal clarification that such constitutional principles could potentially prevail over European Union norms applied through the European Communities Act 1972, in the event of a conflict.⁴⁶ There is therefore a presence of norms that, while not in all jurisdictions (certainly not in the United Kingdom), possessing the capacity to trump legislation, nonetheless shape the meaning of legislation through judicial interpretation and the implementation of governmental policy through judicial review. In their general influence over the interpretation and application of other norms, constitutional norms at common law operate as fundamental rules and principles.

Secondly, restraints on governmental power are partly animated by the common law. Through a combination of substantive doctrines and interpretative principles, the common law is active in prescribing limits on the exercise of governmental power. These limits are often mediated through the rule of law operating either as an independent constitutional principle, as a guide to interpretation of constitutional text or as a source for more specific rules of administrative law. Consequently, the rule of law has been invoked to require government officials to publish guidance for the exercise of discretion,⁴⁷ to bar a government from executing a convicted prisoner prior to the exhaustion of applications before regional

⁴³ Craig, P (2014) ‘Constitutionalising constitutional law: *HS2*’ Public Law at 373.

⁴⁴ Masterman, R and Wheatle, S (2015) ‘A common law resurgence in rights protection?’ European Human Rights Law Review 57 at 58.

⁴⁵ *R (Buckinghamshire County Council) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324 (*HS2* case); *Reference re Secession of Quebec* [1998] 2 SCR 217 (SC, Canada); *Hinds v R* [1977] AC 195 (Judicial Committee of the Privy Council (JCPC), Jamaica).

⁴⁶ *HS2* case supra note 45 at para 207.

⁴⁷ *R (Purdy) v Director of Public Prosecutions* [2009] UKHL 45; [2009] 3 WLR 403.

human rights bodies⁴⁸ and to prevent an Attorney General from overriding the decision of a tribunal.⁴⁹

Finally, the constitutive role played by the common law is admittedly more subtle than its constraining and fundamental roles. Yet, there is in new and changing constitutions an acknowledgement that the common law supplies ‘unstated assumptions’ that help to frame and develop the governing structure of the state. Traditionally accepted common law principles thus guided the design and certification of the Constitution of the Republic of South Africa 1996 and the architecture of the judiciary in the nations of the Commonwealth Caribbean.⁵⁰ In the pivotal *Certification of the Constitution of the Republic of South Africa* by the Constitutional Court of South Africa, the formation of a new judiciary and the roles of Parliament and the executive in the appointment and removal of judges were measured against judicial independence and the separation of powers.⁵¹ The separation of powers figured significantly in early cases on the interpretation of post-colonial constitutions of the mid to late twentieth century, most notably in not only constituting the judicial power separately from the legislative and executive branches, but also in preventing the usurpation or absorption of the judicial power by the legislature.⁵² That such doctrines and principles are influential in creating the institutional structure of new or renewed states in Africa, Asia and the Caribbean is a testament to the relevance of the common law as a constitutional source across temporal and geographical boundaries.

Beyond this basic understanding of the main functions of a constitution, it is the *nature* of a constitution that permits us to perform a more abstract assessment of the potential for common law to perform as a constitution, divorced from an assessment of whether particular norms of the common law speak to the identification of the powers and limitations of the political structure of the state. The law of the constitution is ‘an organic work-in-progress whose lifeblood is the continuity of change’.⁵³ The nature of a constitution is to embody and facilitate an interaction between that change and stability. Accordingly, the interplay of endurance, history and evolution are indispensable elements of the nature of a

⁴⁸ *Thomas v Baptiste* [2000] 2 AC 1 (JCPC, Trinidad and Tobago); *Lewis v AG* [2001] 2 AC 50 (JCPC, Jamaica).

⁴⁹ *R (Evans) v Attorney General* [2015] UKSC 21; [2015] AC 1787.

⁵⁰ *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96); 1996 (10) BCLR 1253 (Constitutional Court, South Africa).

⁵¹ *Ibid* at paras 120-39.

⁵² *Liyanage v R* [1967] 1 AC (JCPC, Ceylon) 259 at 291.

⁵³ Eagleton, T (2005) ‘Reading between the Lines: Courts and Constitutions’ in Hutchinson, A (2005) *Evolution and the Common Law* Cambridge University Press 2005 at 200.

constitution, as explained by Raz,⁵⁴ who sees a constitution ‘as a stable framework for the political and legal institutions of the country, to be adjusted and amended from time to time, but basically to preserve stability and continuity in the legal and political structure, and the basic principles that guide its institutions.’⁵⁵

Evolution and Stability

The common law presents a natural source for a constitution, combining as it does respect for the past, a proven capacity for endurance and an element of evolutionary growth. Indeed, constitutional adjudication and common law adjudication share a method of legal analysis: ‘utilizing the past to resolve present problems in a way that helps to clarify the future.’⁵⁶ The common law’s respect for history is most practically expressed in the role of precedent, which facilitates an iterative process of development of the law. Hence, the very existence of a common law rule depends on a convincing account of prior decisions. More fundamentally however, a look beneath the surface reveals the bedrock of the past in fundamental doctrines that are still utilized in common law courts. For instance, reliance upon rationality stands as a mainstay and building block of public law in the common law world. In fact, the doctrine of *stare decisis* itself beckons to rationality by appealing to the maxim that like cases should be treated alike.⁵⁷

Yet the common law’s regard for history does not devolve into blind veneration; it accommodates the evolution that is both a noted characteristic of the common law method and an essential requirement for the continuing relevance of any constitutional arrangement. Historical regard is balanced with an evolutionary nature that ensures its continued relevance and endurance. The steady evolution of the common law is largely fostered by its responsiveness to reason, changing social conditions and evolving conceptions of public good and public values. A classic example is the gradual judicial restriction of the spousal exception to rape, culminating in its abolition in *R v R* in 1992⁵⁸ but we can also add to this list the gradual development of the right of access to court at common law, which continues to exist as an autonomous common law right, while being influenced by written constitutions (as in Australia) or bills of rights (as with the Human Rights Act 1998 (UK)). There has long been judicial recognition of the need for the individual to have access to independent judicial

⁵⁴ Raz, J (2009) *Between Authority and Interpretation: on the Theory of Law and Practical Reason* Oxford University Press at 324-54.

⁵⁵ Ibid at 324.

⁵⁶ Eagleton, ‘Reading between the Lines’ supra note 53.

⁵⁷ Allan, TRS (2007) ‘Text, Context and Constitution: The Common Law as Public Reason’ in Edlin, D (2007) *Common Law Theory* Cambridge University Press at 187.

⁵⁸ (1991) UKHL 12; [1992] 1 AC 599.

pronouncement on, and protection of, their private rights and interests. Thus, in a 1915 case (*In re Boaler*), it was said that: ‘One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King.’⁵⁹ But momentous decisions of the UK High Court in *ex p. Witham* and of the Supreme Court of Canada in *Trial Lawyers Assn. of British Columbia v British Columbia* modernised this right by applying it to the levy of court fees and taking account of the impact of economic hardships on access to courts.⁶⁰ This constitutional right is now also of relevance to counter-terrorism measures such as asset freezing orders⁶¹ and immigration and refugee policy.⁶²

The constitutional capacity of the common law has itself been an evolutive exercise, which has been vividly revealed in recent decisions in which judges have articulated both the substantive constitutional content of the common law and the methodology by which common law can enforce constitutional rights and constitutional principles. In confirming that constitutional status is recognised in domestic norms of constitutional importance, the *HS2* judgment also confirmed the existence of a tiered domestic legal order in the jurisdictional home of the common law. Further, ‘fundamental principles [...] recognised at common law’ were included within the assemblage of domestic constitutional norms.⁶³

Significant recent evidence of the constitutionalisation of the common law is found in the decision of UK Supreme Court in *Evans v Attorney General* and the Privy Council’s judgment in *Hunte v The State* on an appeal from Trinidad and Tobago; both judgments invoked the rule of law to delineate the review jurisdiction of the court.⁶⁴ *Evans* concerned a claim by a journalist under the Freedom of Information Act 2000 (FOIA) for public access to communications between the Prince of Wales and ministers of government.⁶⁵ The FOI request had been rejected by the relevant government departments, a rejection which was then upheld by the Information Commissioner. The catalyst arose when the Upper Tribunal decided that the letters should be disclosed, in response to which the Attorney General issued a Certificate under section 53 of the FOIA, stating that on reasonable grounds, he had

⁵⁹ [1915] KB 21 (Scrutton J).

⁶⁰ *R v Lord Chancellor, ex p. Witham* [1997] EWHC Admin 237; [1998] QB 575; *Trial Lawyers Association of British Columbia v British Columbia* [2014] 3 SCR 31.

⁶¹ *Ahmed v HM Treasury* [2010] UKSC 2; [2010] 2 AC 534 (UKSC).

⁶² *R (on the Application of Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1925 (Admin) (Silber J.); [2011] EWCA Civ 1710 (CA, England and Wales).

⁶³ *HS2* case supra note 45 at para 207 (Lord Neuberger and Lord Mance).

⁶⁴ *Evans* supra note 49; *Hunte v The State* [2015] UKPC 33; [2016] 1 LRC 116 (JCPC, Trinidad and Tobago).

⁶⁵ *Evans* supra note 49.

concluded that the government departments had been entitled to refuse disclosure of the letters. The issue of the certificate was the subject of judicial review proceedings which were eventually appealed to the Supreme Court. In arriving at the conclusion that the Certificate was invalid and should be quashed, the President of the Supreme Court issued a plurality judgment which framed the issue in terms of the common law constitution.

The judgment identified two constitutional principles which were described as ‘fundamental components of the rule of law’ and were viewed as applicable beyond the boundaries of the UK: first, that decisions of a court are binding and cannot be ignored or set aside and second, that executive decisions and actions are, subject to exceptions, reviewable by the court.⁶⁶ Lord Neuberger thereby identified both an *objective* state-centred component of the rule of law protecting the finality of court decisions under the constitution and a *subjective* individual-centred component, which speaks to the protection of individual rights.

The Privy Council also appealed to the rule of law in *Hunte*, in this case to determine the circumstances in which the Board should depart from previous decisions. The issue raised in the case was the jurisdiction of the Privy Council to commute a sentence on *constitutional* grounds when hearing an appeal from a *criminal* trial. The Privy Council had held as recently as 2014 that it did have such jurisdiction,⁶⁷ but on fuller consideration of the issue in *Hunte*, the majority concluded that the Privy Council had no such jurisdiction in a criminal appeal and that a constitutional challenge to the sentence would have to be mounted by a constitutional motion. Having so concluded, the Board then considered whether to depart from its previous decision in *Ramdeen*, and in so doing ‘depart from the strong presumption in favour of respecting precedent.’ Both the majority judgment issued by Lord Toulson and the concurring judgment delivered by Lord Neuberger used the rule of law to resolve this question.⁶⁸ In deciding that the Privy Council must depart from its 2014 decision, Lord Toulson reasoned that: ‘If the Board is persuaded that it has taken to itself a judicial power which it does not possess, it would be damaging to respect for the rule of law to continue to exercise a purported judicial power contrary to the provisions of the Constitution.’⁶⁹ The common law - through appeal to the rule of law - has therefore been of constitutional service in determining the constitutional scope of judicial power.

The common law’s constitutional relevance is increasingly evident in judicial decisions that seek to resolve questions of jurisdiction and tensions between traditional and

⁶⁶ *Evans* supra note 49 at para 52.

⁶⁷ *Ramdeen v The State* [2014] UKPC 7; [2015] AC 562 (JCPC, Trinidad and Tobago).

⁶⁸ *Hunte* supra note 64 at para 68 (Lord Toulson), at para 78 (Lord Neuberger).

⁶⁹ *Hunte* supra note 64 at para 68 (Lord Toulson).

contemporary norms. Moreover, in arriving at these resolutions, longstanding common law ideas and norms have been expanded, elevated and repurposed. In this sense, the evolution of the common law is married with the evolution of the constitution.

Catholicity and Receptivity

The case for common law as a source for a *cosmopolitan* constitution rests partly on a conceptualisation of the common law constitution as catholic in its development and application. Both cosmopolitan theory and comparative studies reveal that at a fundamental level, a constitution is not- and cannot be- an exercise in exclusivity. There are philosophical, institutional and experiential bonds that necessarily influence the development of a constitution. There is ample comparative evidence of the transnational capacity of the common law; constitutional case law in the common law world demonstrates transnational judicial dialogue in developing common law constitutional norms.⁷⁰

At a fundamental level, the broad applicability and receptivity of the common law make it well suited to perform the transnational task demanded of a cosmopolitan constitution.⁷¹ Sir John Laws has described catholicity as one of the virtues of the common law, noting that ‘the common law draws inspiration from many sources’ and ‘has been greatly enriched from [...] implants’, including implants from Europe through the European Union and the European Convention on Human Rights.⁷² There is much comparative evidence of the transnational capacity of the common law that can be gleaned from case law demonstrating transnational judicial dialogue in developing constitutional norms of the common law.⁷³ Thus, the doctrines of proportionality and legitimate expectations continue to transform public law in common law countries, despite having ‘a distinctly European pedigree.’⁷⁴ Along with influential judgments of European regional courts, stand authoritative pronouncements from the Supreme Court of Canada elucidating the proportionality test.⁷⁵ Canada’s *Oakes* test has been approvingly cited or followed by the Privy Council, the Constitutional Court of South Africa, the UK Supreme Court and the New Zealand Court of

⁷⁰ See, for example, *Re: Resolution to amend the Constitution (Patriation Reference)* [1981] 1 SCR 753 at 881-85; *R v Anderson* [2002] UKHL 46; [2003] 1 AC 837 at para 39; *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; [2015] AC 657 at paras 166-81.

⁷¹ Laws, J (2014) *The Common Law Constitution* Cambridge University Press at 58-64; *Kennedy v Charity Commission* [2014] UKSC 20; [2015] AC 455.

⁷² Laws, *The Common Law Constitution* supra note 71 at 60-64; See also Rodger, A (2005) ‘A Time for Everything under the law: some reflections on retrospectivity’ (121) *Law Quarterly Review* 57 at 72.

⁷³ See, for example, *Patriation Reference* supra note 70 at 881-85; *Anderson* supra note 70 at para 39; *Nicklinson* supra note 70 at paras 166-81.

⁷⁴ Laws, *The Common Law Constitution* supra note 71 at 60.

⁷⁵ *R v Oakes* [1986] 1 SCR 103.

Appeal.⁷⁶ The doctrine of legitimate expectations similarly reflects an influence from outside the common law world, as it is believed to have European origins.⁷⁷ Its common law form has been enriched by an interaction of judgments from Australia, the Commonwealth Caribbean and the United Kingdom. Two areas at the vanguard of legitimate expectations- the doctrine's use in facilitating the observance of unincorporated treaties and the development of substantive legitimate expectations- have been aided by references to transnational conversations. Filtering unincorporated treaties through legitimate expectations has grown through judicial decisions of the Privy Council and the Caribbean Court of Justice in death penalty cases from the Commonwealth Caribbean.⁷⁸ These developments are exemplified in the decision of the Caribbean Court of Justice in *Attorney General v Joseph and Boyce* – following analysis of case law from a wide range of common law jurisdictions- that an individual convicted of murder and sentenced to death can derive substantive legitimate expectations from the ratification of a treaty.⁷⁹ The legacy of landmark cases on the domestic implications of unincorporated treaties was recently noted by Lord Kerr in concluding that the unincorporated UN Convention on the Rights of the Child should be directly enforceable in the UK.⁸⁰ Such ‘cross-pollination’ between jurisdictions encourages the constitutionalisation of the common law while demonstrating the common law's transnational scope.

Ugly Truths and Growing Pains

While justifiably lauding the constitutional and transnational facility of the common law, the same self-awareness that is brought to bear on claims of globalised law must also be observed in our assessment of the common law's capacity for transnational constitutionalism in the 21st century. This self-awareness demands frank acknowledgement of the historical successes and failures of the common law in establishing a broad base of constitutional norms. Such acknowledgment responds to the familiar critique by sceptics that common law

⁷⁶ *A v Secretary of State for the Home Department* [2004] UKHL 56; [2005] 2 AC 68; *Aster Communities Ltd v Akerman-Livingstone* [2015] UKSC 15; [2015] HLR 20; *de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (JCPC, Antigua and Barbuda); *Moonen v Film and Literature Boards of Review* [2000] NZLR 9 (CA, New Zealand) at 16-19; Michael Taggart (2004) ‘The Tub of Public Law’ in David Dyzenhaus (ed) (2004) *The Unity of Public Law* Hart Publishing at 476.

⁷⁷ Laws, *The Common Law Constitution* supra note 71 at 58-64; Lord Steyn, ‘Democracy Through Law’ [2002] EHRLR 723 at 735-36.

⁷⁸ *Lewis* supra note 48; *AG v Joseph and Boyce* (2006) 69 WIR 104 (CCJ, Barbados); *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32; [2012] 1 AC 1.

⁷⁹ *Attorney General v Joseph and Boyce* (2006) 69 WIR 104 at paras 103-31.

⁸⁰ *R (SG (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16; [2015] 4 All ER 939 at paras 247-57 (Lord Kerr, dissenting).

constitutionalists ‘rely on an idealised conception of the common law’.⁸¹ Certainly, there was a historical tendency of the common law to privilege freedom of contract, private property rights and traditional conceptions of rational public decision-making over broader claims to the protection of public values in promoting equal opportunity. Thus, it has been said that ‘the common law recognizes the rights of private parties to do what they please with their property. Such a right necessarily guarantees the right to exclude’.⁸² Such traditional rights and freedoms were jealously protected in the face of challenges based on ideas of equality and non-discrimination.

One need only reflect on a few notorious (or at the very least controversial) decisions to appreciate the flaws in the common law’s historical approach to some matters of constitutional significance.⁸³ While *Somerset’s Case* has been invoked as proof of the common law’s rejection of slavery,⁸⁴ the narrow scope of Lord Mansfield’s celebrated judgment is laid bare in subsequent decisions. Accordingly, the *Grace Jones* case affirmed that though a slave could not be coerced in England, once she returned to the colonies, she had no claim to freedom.⁸⁵ That decision was hailed in the Royal Gazette of Jamaica as one that ‘stamp[ed] a value and a consistency upon West India property’ and affirmed that ‘the Colonists have a right to protect that property’.⁸⁶ Decades later, in 1859 the Court of Common Pleas upheld a contract entered into by a British company for the sale of slaves in Brazil.⁸⁷

More troubling examples exist in the last century. *Roberts v Hopwood*, for instance, has been fairly cited as a symbol of judicial resistance to efforts to remove gender discrimination.⁸⁸ The attempt by the Poplar Borough Council to introduce equal pay for men and women council employees on their lowest pay grade was invalidated by the House of Lords, which took the view that the Council had irrationally ‘allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure equality of the sexes in the matter of wages in the world of labour.’⁸⁹ Sixty

⁸¹ Poole, T (2002) ‘Dogmatic Liberalism? TRS Allan and the Common Law Constitution’ (65) *Modern Law Review* 463 at 470.

⁸² Note (1993) ‘The Antidiscrimination Principle in the Common Law’ (102) *Harvard Law Review* 1994.

⁸³ As the cases cited below relate to equality and race relations, they touch upon areas that are quintessentially within the purview of constitutional law.

⁸⁴ Lord Reed (11 November 2013) ‘The Common Law and the ECHR’ *The Inner Temple*.

⁸⁵ *The Slave, Grace* (1827) 2 Haggard 94, 166 ER 179

⁸⁶ Peter Fryer (1984) *Staying Power: The History of Black People in Britain* Pluto Press 1984 at 130.

⁸⁷ *Santos v Illidge* (1859) 6 CB (NS) 841, 141 E.R. 1404.

⁸⁸ *Roberts v Hopwood* [1925] AC 578 (HL); Sandra Fredman (2011) *Discrimination Law* Clarendon Law Series, Oxford University Press at 40.

⁸⁹ *Roberts v Hopwood* supra note 88 at 379 (Lord Atkinson).

years later, on a matter related to race relations, the House of Lords was similarly restrictive in its view of the proper purposes for which government policy may be formulated. Leicester City Council banned the Leicester Rugby Club from using its recreation ground for the reason that some members of the rugby club participated in an unofficial tour of apartheid South Africa. A unanimous House of Lords struck down the Council's decision, unswayed by the Council's argument that it was duty-bound under the Race Relations Act 1976 to promote good race relations.⁹⁰

Yet, despite these early signs of resistance to the promotion of equality in the common law, the common law's openness to progress is seen in the steady turn in recent decades towards a broader embrace of modern progressive public values.⁹¹ In a decision that confronted both legacies of common law and colonialism, the High Court of Australia updated the common law to take account of 'contemporary notions of justice and human rights'. In *Mabo v Queensland (No 2)* the High Court rejected the common law doctrine that Australia was *terra nullius* prior to settlement by Europeans- a doctrine described as 'frozen in an age of racial discrimination'- and thereby recognised the native title of indigenous populations of Australia.⁹² Steps have also been taken in the UK where in *R v Immigration Appeal Tribunal, ex p Begum*,⁹³ a requirement in immigration rules that a dependent relative applying for admission to the UK must have a standard of living substantially below that of her own country was held to be *ultra vires*, as it would 'automatically disqualify from admission [...] virtually all those from the poorer countries of the world, irrespective of whatever exceptional compassionate circumstances may surround their case, and yet allow most dependants from the more affluent countries to be considered on general compassionate grounds.'

Beyond critique of specific applications of the common law, there is a longstanding complaint that the procedural roots of the common law seem to betray a preoccupation with procedure rather than substance. Allied with the emphasis on procedure was a rather residual and remedial focus, particularly with respect to rights. So, historically, 'common law was not a substantive law at all'⁹⁴ and was 'in essence procedural'.⁹⁵ However, the procedural

⁹⁰ *Wheeler v Leicester City Council* [1985] AC 1054. Along with the slavery and race relations cases, the common law has a checkered history of responding to internment without trial in times of war and unrest as dramatically demonstrated in *Liversidge v Anderson* [1941] UKHL 1; [1942] AC 206, but the majority decision is recognised as having no authority in present law and Lord Atkin's dissent has since had much more influence.

⁹¹ The term 'progressive' is used here to denote advocacy for reform, particularly social reform.

⁹² (1992) 175 CLR 1 [41].

⁹³ [1986] Imm AR 385, QBD; Jowell QC, J (1994) 'Is Equality a Constitutional Principle?' (47) CLP 1 at 13.

⁹⁴ Robert Leckey (2015) *Bills of Rights in the Common Law* Cambridge University Press at 36.

emphasis and expertise of the common law is actually shown to be a strength when marshalled to advance and develop norms such as protections of access to court, fair procedure or natural justice. The Privy Council in *Rees v Crane* relied on common law procedural protections to find that a judge had been entitled to be heard in the preliminary proceedings that precipitated his suspension. Failure to grant the judge an opportunity to reply to allegations against him constituted a violation of the principles of natural justice and the right to fair hearing under section 4(b) of the Constitution of Trinidad and Tobago.⁹⁶ In the *Horseferry Road Magistrates' Court* case the UK House of Lords was able to find that the appellant's removal from South Africa to the United Kingdom was unlawful through the doctrine of abuse of process.⁹⁷ Most recently, in *Osborn v Parole Board*, Lord Reed observed that the right to protection of the law, as guaranteed in article 6 of the ECHR, 'is fulfilled primarily through detailed rules and principles to be found in several areas of domestic law, including the law of evidence and procedure, administrative law, and the law relating to legal aid.'⁹⁸

The central attributes of the common law therefore provide a combination of flexibility and stability which is crucial to constitutional sustenance. In balancing a reliance on precedent and responsiveness to evolving conceptions of the public good, the common law provides a basis for the necessary sustained relevance of a constitution. Moreover, the common law's development reveals receptiveness to foreign influences as well as a capacity for broad dissemination, and consequently, for cosmopolitan relevance. The following section of the article will provide specific examples of the common law constitution as an instance of bounded cosmopolitanism.

SIGNS OF COSMOPOLITAN COMMON LAW CONSTITUTIONALISM

The cosmopolitan common law constitution is comprised of constitutional norms and methodologies that have gained consensus among common law jurisdictions. Manifestations of a developing cosmopolitan common law constitution are to be found in both the substantive development of common law norms and the common law affiliated methodological techniques utilised to develop the constitutional project in common law

⁹⁵ Michael Lobban (1991) *The Common Law and English Jurisprudence, 1760-1850* Clarendon Press at 16.

⁹⁶ [1994] 2 AC 173.

⁹⁷ *R v Horseferry Road Magistrates' Court, ex p Bennett* (No 1) [1993] UKHL 10; [1994] 1 AC 42.

⁹⁸ *Osborn v Parole Board* [2013] UKSC 61; [2014] AC 1115 at para 55.

states. It is the combined effect of substance and methodology that presents a meaningful picture of cosmopolitan common law constitutionalism. Emphasis on substance to the exclusion of the impact of shared methodology would be misleading and undermine the salience of the discourse on both common law constitutionalism and cosmopolitan constitutionalism. As discussed below, accepted norms and methods include common law rights such as due process and principles such as judicial independence, as well as interpretive presumptions such as the principle of legality. Recalling that cosmopolitan common law constitutionalism is a developing transnational conversation- not a complete system- there is no exhaustive list of constitutive norms and methods. The examples in this section are therefore representative, having achieved acceptance and repeated application across varying constitutional models in the common law world and revealing the constitutional and cosmopolitan capabilities of the common law.

Substantive Law

Courts in the common law world engage with each other in developing and applying rights and institutional norms existing under their respective constitutions, bills of rights or at common law. Undoubtedly, the relevance of the common law to both codified and uncoded constitutions is a prerequisite for its suitability to the cosmopolitan task. On this score common law norms are far from deficient as they speak to both constitutional formulations, enabling the construction of ‘the abstract clauses of a “written” constitution’ while ‘giv[ing] an “unwritten” constitution its principal legal content.’⁹⁹

The continuing constitutional significance of common law rights in the United Kingdom was affirmed in 2001 by the UK House of Lords in *Daly*, where the Bench put beyond doubt that common law rights survived the enactment and implementation of the Human Rights Act 1998 and the consequent enforcement of Convention rights in the UK.¹⁰⁰ Despite a period of relative dormancy and attendant rumours of the demise of common law rights, there are strong signals that they are again in the ascendancy.¹⁰¹ While the common law’s significance in states with codified constitutions is more subtle, it is nonetheless momentous. Indeed, common law constitutionalism has infused constitutional interpretation in such states, producing a more complex interaction between unwritten and written

⁹⁹ Allan, ‘Text, Context and Constitution’ supra note 57 at 185.

¹⁰⁰ *Regina (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532.

¹⁰¹ Masterman and Wheatle supra note 44; Lady Hale, (2014) ‘UK Constitutionalism on the March?’ (19) Judicial Review 201. Cf Clayton QC, R (2015) ‘The empire strikes back: common law rights and the Human Rights Act’ Public Law 3.

constitutionalism than would immediately be assumed in states that had enacted formal constitutions. Thus, in *Thomas v Baptiste*, on an appeal from Trinidad and Tobago, the Privy Council found that prisoners who had been sentenced to death had a common law right existing alongside the Constitution, to be allowed to complete a pending legal process ‘without having it rendered nugatory by executive action’.¹⁰² Consequently, the applicants could not be executed until their pending petitions before the Inter-American Commission on Human Rights had been determined.

The continuing significance of common law constitutional norms is strongly represented in due process and fair hearing rights. Fair hearing and due process protections have evolved as part of a cluster of norms prescribing principles for institutional interaction as well as opportunities for citizens to contribute to the articulation and enforcement of the constitution. While guarantees of a right to fair hearing and due process have found expression in constitutional texts in some nations, in determining the content of such rights and their scope of application, judges have repeatedly sought guidance from the common law. In *Ong Ah Chuan v Public Prosecutor*¹⁰³ – a Privy Council judgment on appeal from Singapore- Lord Diplock noted, in a passage that has been cited by subsequent Benches of the Judicial Committee of the Privy Council, the Caribbean Court of Justice, and the High Court of Australia,¹⁰⁴ that:

a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to “law” in such contexts as “in accordance with law”, “equality before the law”, “protection of the law” and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution.¹⁰⁵

The potency encapsulated in what seems, superficially, to be a procedural protection should not be underestimated. Its potential has been demonstrated in its use to compel the executive

¹⁰² *Thomas v Baptiste* supra note 48 at 24; Demerieux, M (2013) ‘The Common Law and the Litigation of Fundamental Rights and Freedoms before the Privy Council’ in David Berry and Tracy Robinson (eds) (2013) *Transitions in Caribbean Law: Law-making, Constitutionalism and the Convergence of National and International Law* Caribbean Law Publishing Company at 196-98.

¹⁰³ [1980] UKPC 32; [1981] AC 648.

¹⁰⁴ See, eg, *Baker v R* (2004) 223 CLR 513 at 572 (Callinan J).

¹⁰⁵ *Ong Ah Chuan* supra note 103 at 670.

to allow a prisoner to make representations as part of the determination whether to exercise the prerogative of mercy,¹⁰⁶ to reject evidence obtained by torture¹⁰⁷ and to delay (and effectively prevent) executions.¹⁰⁸

Among the remaining influential facets of common law in a transnational scope are fundamental principles such as the rule of law and judicial independence. The methodology of reference to unwritten norms is discussed in greater detail below but some attention to the normative influence of particular principles is merited. The rule of law- one of the pillars of Dicey's classic description of the common law constitution- continues to resound, while its boundaries have been expanded far beyond Dicey's conception. The principle has been characterised as an unstated assumption of the Australian Constitution and has generated a requirement for a 'minimum provision of judicial review'. This unstated assumption was activated in *Plaintiff S157/2002 v Commonwealth* where the High Court of Australia was called upon to interpret an expansive privative clause in the Migration Act 1958 (Cth). The High Court narrowed the applicability of the clause by reference to the Constitution and its implication of the rule of law. Specifically, the Court interpreted section 75(v) of the Constitution of the Commonwealth of Australia 1900, which confers on the High Court original jurisdiction to hear matters in which the remedies of mandamus, prohibition or injunction are sought against an officer of the Commonwealth, as entrenching a 'minimum provision of judicial review'. The Court proceeded to find that this section 'constitutes a textual reinforcement' of the rule of law as an assumption of the Australian Constitution.¹⁰⁹ Consequently, the rule of law constrains attempts to limit judicial review of federal and administrative acts. A related idea of the rule of law was employed by Lady Hale in *Cart v Upper Tribunal* in determining the scope of judicial review for decisions of the Upper Tribunal which were not amenable to appeal under the Tribunals Act 2007 (UK). Declaring that the 'real question [...] is what level of independent scrutiny outside the tribunal structure is required by the rule of law',¹¹⁰ the UK Supreme Court confirmed that judicial review was available and mapped the breadth of such review.

¹⁰⁶ *Lewis v AG* supra note 48.

¹⁰⁷ *A (FC) v Secretary of State for the Home Department* [2005] UKHL 71; [2006] 2 AC 221.

¹⁰⁸ *Thomas v Baptiste* supra note 48.

¹⁰⁹ *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (HC, Australia) at paras 5 and 103.

¹¹⁰ [2011] UKSC 28; [2012] 1 AC 663 (UKSC) at para 51.

Methodology

Procedure and judicial technique are so central to the common law tradition that an analysis of methodology is critical in appreciating the development of the common law as a transnational constitutional force.¹¹¹ Judicial techniques and methodologies reveal continuity between judicial review prior and subsequent to bills of rights as well as kinship among jurisdictions with codified constitutions and those without.¹¹² Among common law methodological techniques that merit consideration are the principle of legality and reasoning by unwritten principles.¹¹³

Methodological commonality exists in the position taken by common law courts that legislatures enact statutes against a background of constitutional principles and rights, which ‘places powerful constraints on what statutory language can be’.¹¹⁴ Analogous and interrelated features connect constitutional adjudication in the common law world, with courts applying similar techniques to interpret legislation against the background of constitutional norms. Lord Hoffmann’s contention in *Simms* of a near identity between the principle of legality and ‘principles of constitutionality [...] which exist in countries where the power of the legislature is expressly limited by a constitutional document’ was certainly overly complimentary of the common law and under-appreciative of the enforcement power granted to courts under written constitutions.¹¹⁵ Nonetheless, there is more than a kernel of truth in his oft-cited assertion.¹¹⁶

Common to both the principle of legality and constitutional enforcement mechanisms are two important features. First, there is the presumption that legislation is to be interpreted consistently with the norms of the constitution unless it is impossible to do so.¹¹⁷ While the interpretative power consequent upon this presumption gives the appearance of judicial empowerment at the expense of legislative will, the constitutional implications of the presumption are more subtle. It embodies a balance of respect for legislative decision-making

¹¹¹ Leckey supra note 94 at 36.

¹¹² Leckey supra note 94 at 18-19.

¹¹³ The presumption of compatibility with international law has also made its mark. See, for eg, *Salomon v Commissioners of Customs and Excise* [1967] 2 QB 116 at 143; *Boyce v The Queen* [2004] UKPC 32; [2005] 1 AC 400 at paras 25 and 81.

¹¹⁴ Allan, TRS (2009) ‘In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law’ (22) Canadian Journal of Law and Jurisprudence 187 at 198.

¹¹⁵ *R v Secretary of State for Home Department, ex p Simms* [2002] 2 AC 115 at 131. Lord Hoffmann’s passage articulating the principle of legality was approvingly cited in *Plaintiff S157* supra note 109 at para 30 and *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR (HC, Australia) 543 at 582.

¹¹⁶ Allan, ‘In Defence of the Common Law Constitution’ supra note 114 at 198.

¹¹⁷ Henry-Comley, A (2013) ‘The Principle of Legality: An Australian Common Law Bill of Rights’ (2013) 15 University of Notre Dame Australia Law Review 83 at 107.

and respect for the constitution as fundamental law. An aspect of this presumption is the idea that the legislature itself plays a role in upholding constitutional norms, and as such, does not generally intend to legislate in contravention of those norms. In states with codified constitutions (particularly those with justiciable bills of rights), the respect for the legislature is further heightened by the fact that rights consistent interpretation forestalls more aggressive corrective action on the part of the judiciary in the form of invalidation.¹¹⁸

Second, both mechanisms preserve the possibility for legislative override of judicial interpretation and application of constitutional norms. For the principle of legality the legislative backstop is part and parcel of the principle itself. Thus, a clear express legislative statement indicating the intention to override a constitutional principle or fundamental right displaces the presumption of constitutional consistency. Consequently, the majority of the High Court of Australia in *Al-Kateb v Godwin* found the presumption to be unhelpful in interpreting sections of the Migration Act 1958 (Cth) that appeared to authorise the indefinite detention of a non-citizen who has entered Australia unlawfully. McHugh J opined that the provisions were ‘too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights.’¹¹⁹ So also the House of Lords declined to read down a police stop and search power conferred in section 44 of the Prevention of Terrorism Act 2000 in *Gillan v Commissioner of Police*. Beyond doubting whether a constitutional right was operative, the Law Lords found that even if the relevant sections were ‘accepted as infringing a fundamental human right, [...] they do not do so by general words but by provisions of a detailed, specific and unambiguous character’, thus allowing no room for the application of the principle of legality.¹²⁰

Legislative override mechanisms exist in a variety of formulations ranging from notwithstanding clauses to ‘special acts’ to constitutional amendments. Canada’s ‘notwithstanding clause’ enables Canadian legislatures to provide for the operation of legislation ‘notwithstanding’ the inconsistency of such legislation with provisions of the Canadian Charter of Rights and Freedoms.¹²¹ The availability of legislative override is a feature of what is often referred to as the dialogue model of constitutional law or more

¹¹⁸ *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153 (HC, Australia) 180; *Jamaica Bar Association v Attorney General* JM 2007 CA 69 (CA, Jamaica).

¹¹⁹ *Al-Kateb v Godwin* (2004) 219 CLR 562 at para 33 (McHugh J).

¹²⁰ *R (Gillan) v Commissioner of Police of the Metropolis* [2006] UKHL 12; [2006] 2 AC 307 at paras 13-15 (Lord Bingham), paras 59-60 (Lord Scott), para 70 (Lord Walker) and para 71 (Lord Brown).

¹²¹ Hogg, P and Bushell, A (1997) ‘The Charter Dialogue Between the Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)’ (35) *Osgoode Law Journal* 75; Leighton McDonald (2004) ‘New directions in the Australian bill of rights debate’ *Public Law* 22 at 27.

recently, the ‘new commonwealth model of constitutionalism’.¹²² However, override mechanisms are also featured in older constitutional models in the form of ‘Special Acts’, for instance. The Constitution of Trinidad and Tobago provides an example; under section 13, Parliament may enact legislation that expressly declares that the statute shall have effect regardless of its inconsistency with the constitution’s rights guarantees so long as it is supported by at least a three-fifths majority of each Chamber.¹²³ Ultimately, some constitutional designs permit room for override in the form of constitutional amendment, a feat which has been accomplished in several jurisdictions, including Barbados, which overrode judicial interpretations of the constitutional right to freedom from inhuman and degrading treatment.¹²⁴

Further methodological commonality exists in the enduring technique of referring to unwritten principles in the interpretation of constitutional instruments. Such principles contribute historical evidence, comparative insights and broader constitutional context for the constitutional text at issue. Principles that have been so engaged include judicial independence, the rule of law, separation of powers, democracy and equality.¹²⁵ The separation of powers is a useful exemplar, with both the Privy Council and House of Lords invoking the principle in interpretation of codified constitutions and the European Convention on Human Rights. The principle was described by Lord Phillips in a 2011 judgment as having ‘progressively become part of the, largely unwritten, constitution of the United Kingdom’,¹²⁶ and has been repeatedly characterised as ‘entrenched in the so-called Westminster model of written constitutions.’¹²⁷ The Caribbean Court of Justice contextualised the separation of powers in a written constitutional framework in *Attorney*

¹²² Gardbaum supra note 42.

¹²³ A similar provision appeared in section 50 of the Constitution of Jamaica 1962 but the section has since been repealed by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 (Jamaica).

¹²⁴ See Constitution (Amendment) Act 2002, s.2 (Barbados); Charter of Fundamental Rights and Freedoms 2011, s. 13(8) (Jamaica). Undoubtedly, the prospect of amendment is further complicated in states such as the United States of America where amendment requires the support of two-thirds of the House of Representatives and the Senate as well as two-thirds of state legislatures or the Republic of Ireland, where Article 46 of the Constitution of the Republic of Ireland requires that every proposed amendment be approved by referendum. Nonetheless, the amendment power has been activated in the USA to overturn the constitutional interpretation of the Supreme Court, having been used in modern times to enact the Twenty-Sixth Amendment which protects the right to vote of all persons over 18 at both state and federal level, thereby overriding the US Supreme Court decision in *Oregon v Mitchell*, 400 US 112 (1970).

¹²⁵ *Purdy* supra note 47; *Joseph and Boyce* supra note 79; *Australian Communist Party v Commonwealth of Australia* (1951) 83 CLR 1 (HC, Australia) at 193; *Hinds* supra note 45; *Reference re Remuneration of Judges of the Provincial Court (Remuneration Reference or Provincial Judges Reference)* [1985] 1 SCR 721; *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 3 All ER 411 (HL); *Papachristou v City of Jacksonville* 405 US 156, 92 S Ct 839 (1972) at 171, 848; *Begum* supra note 93.

¹²⁶ *Fuller v Attorney General* [2011] UKPC 23; (2011) 32 BHRC 394 (JCPC, Belize).

¹²⁷ *Ibid* at paras 38-41; *Hinds* supra note 45; *State v Khoyratty* [2006] UKPC 13; [2006] 4 LRC 403.

General v Zuniga on appeal from Belize, stating that ‘in the post-independence Anglophone Caribbean the doctrine of the separation of powers derives its force from the fact that the fundamental law upon which the legal order rests, i.e. the Constitution, disperses the power of the sovereign State among various branches’ and further argued: ‘Application of the separation of powers doctrine upholds the Constitution, advances the rule of law and promotes the description of Belize as “a sovereign democratic state”.’¹²⁸ Through this interpretative technique, the separation of powers has underpinned judicial independence, natural justice and equality before the law, and has assisted in shaping and articulating the court’s role in the application of constitutions and bills of rights.¹²⁹

An exclusive focus on substantive law without heed to the impact of common law methodology in shaping judicial approaches to bills of rights and constitutions would produce a flawed and anaemic understanding of the role of the common law in transnational constitutionalism. Thus, an account either in support of, or opposition to, the continuing import of common law rights, must not only address the range and substance of common law rights.¹³⁰ Such accounts must also acknowledge the importance of methodology developed under the common law, which continues to affect judicial interpretation across a spectrum of common law countries. It is often the connector of methodology that links jurisdictions of differing constitutional frameworks within the common law family.

CONCLUSION

The cosmopolitan impulse, then, can be useful in accounting for and developing our articulation of transnational legal interactions. The danger emerges when that impulse results in accounts of globalised law that are unrestrained by the current state of transnational legal conversations. Bounded cosmopolitanism offers a novel and modest framework for both marshalling and restraining the cosmopolitan impulse, allowing for more realistic accounts of legal orders that extend beyond the state but are nonetheless tethered by meaningful acknowledgment of compartmentalisation. The emergence of a cosmopolitan common law constitution presents one model of bounded cosmopolitanism, evidencing an interplay

¹²⁸ *AG of Belize v Zuniga* [2014] CCJ 2 at para 40 (Justice Saunders).

¹²⁹ *Leeth v Commonwealth of Australia* (1992) 174 CLR 455 (HC, Australia) at 485 (Deane and Toohey JJ); *Remuneration Reference* supra note 125; Wheeler, F (2004) ‘Due Process, Judicial Power and Chapter III in the New High Court’ (32) Federal Law Review 205; Masterman, R (2005) ‘Determinative in the abstract? Article 6(1) and the separation of powers’ European Human Rights Law Review 628.

¹³⁰ See Leckey supra note 94.

between the convergent currents of common law method and fundamental principles with the divergent influence of particularities of local constitutional design.

The breadth of influence of the common law in constitutional development across temporal and spatial divides is largely a function of its ubiquity, in that every statute 'is mediated to the people by the common law.'¹³¹ In both jurisdictions with uncoded constitutional arrangements and states operating within a codified constitutional model, the common law acts as a 'unifying principle', furnishing tools to construe legislation and a framework to make sense of constitutional changes and resolve disputes between institutions of state and between the individual and the state. Evolution and adaptability are pivotal to the transnational relevance of any constitutional source or framework and the common law continues to function in this regard as an instrument that enables institutions to understand and contextualize legal –especially constitutional- changes as well as the socio-political transformations that result from, and contribute to, the interconnectedness of law and society today. Thus, 'the strength of the common law does not lie in its conformity but in its ability to adapt to changing circumstances.'¹³²

While this article has focused on making the case for the existence of cosmopolitan common law constitutionalism, the framework for this model- bounded cosmopolitanism- has greater resonance and can be adopted to frame analysis of further transnational orders. The bounded cosmopolitan framework can provide a foothold for further research on transnational legal orders, and on the continuing attempt of transnational lawyers to reconcile cosmopolitanism and heterogeneity. Moreover, this proposal seeks to further engagement with theories that emphasise the move beyond the state; it seeks to confirm and embrace this direction of the law while cautioning that meaningful cosmopolitanism in law ought to be plurality-sensitive, recognising harmonisation and assimilation alongside difference and diversity.

¹³¹ Laws, *Common Law Constitution* supra note 71 at 6.

¹³² Öricü, E (1999) *Critical Comparative Law: Considering Paradoxes for Legal Systems in Transition* Deventer, Kluwer Law International at para 5.2.